MAR 15 1993

No. 92-1369

In The

Supreme Court of the United States

October Term, 1992

JOSEPH ALBERICI AND THERESA ALBERICI, H/W,

Petitioners,

v.

SAFEGUARD MUTUAL INSURANCE COMPANY, GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORP., LTD., QUAKER STATE MUTUAL GROUP, AND HOME MUTUAL INSURANCE COMPANY OF PA, INSURANCE PLACEMENT FACILITY OF PENNSYLVANIA,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION

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I. COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review a state court's entry of summary judgment in favor of defendant insurers and against a claimant of fire insurance proceeds, where the state court determined that the claimant was barred from recovering the fire insurance proceeds due to his prior conviction for mail fraud in connection with a scheme to defraud the insurance companies?

A. Does the state court decision sought to be reviewed here rest upon an adequate and independent state law basis?

B. Does this case involve a substantial federal issue to be determined by this Court?

C. Did petitioners raise, and preserve, a substantial federal issue during the proceedings in state court?

2. Was the state court judgment here sought to be reviewed incorrect?

II. PARTIES TO THE PROCEEDINGS

Joseph Alberici and Theresa Alberici,

Petitioners

Safeguard Mutual Insurance Company
Pennsylvania Insurance Guaranty Association
General Accident Fire and Life Insurance Corp., Ltd.
Insurance Placement Facility of Pennsylvania
Quaker State Mutual Insurance Group
Home Mutual Insurance Company of Pennsylvania,

Respondents

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V. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BELOW

The opinion of the Pennsylvania Superior Court in this case is reprinted in the appendix as Exhibit "A". It is a memorandum decision, which has not, as yet, been reported either officially or unofficially. The opinion of the trial court (reprinted in the Appendix as Exhibit "B") granting defendant's Motion for Summary Judgment is reported at 78 Del. Co. Rep. 144 (1991). The Supreme Court of Pennsylvania's decision not to grant allowance of appeal was issued on August 18, 1992. The Pennsylvania Supreme Court's refusal to reconsider its denial of the Petition for Allowance of Appeal was issued on October 8, 1992. Neither decision has been reported in either an official or unofficial reporter.

VI. COUNTERSTATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

Respondents note that petitioners assert jurisdiction in this Court under 28 U.S.C. §1254. Apparently, petitioners have cited the wrong statute, as 28 U.S.C. §1257 governs this Court's jurisdiction to issue writs of certiorari to state courts.

There is no basis for jurisdiction in this Court. Established principles of federalism prohibit this Court from reviewing the decisions of state courts which rest upon an adequate and independent state law basis. This case, which involves a determination by the courts of the Commonwealth of Pennsylvania, that a claimant's conviction of mail fraud, on a charge of scheming to defraud fire

insurers, prohibits his recovery under the policies of insurance issued by those fire insurers, implicates only the proper interpretation to be put to Pennsylvania common law. This case does not affect, in any manner, federal statutes, treaties, or common law.

Moreover, even if it should be determined that, in the abstract, some kind of federal question is implicated by this case, it is apparent that no novel, unique, or substantial question is present. Without a substantial federal question, this court is without jurisdiction to issue the requested writ.

Finally, an examination of the record in this case will reveal that Petitioner has failed, completely, to raise or preserve a substantial federal issue during the state court proceedings. Only now, when confronted with the need to concoct some basis for this court to exercise jurisdiction, has Petitioner come forward with the alleged constitutional violations of which he now complains. The failure to raise and preserve a federal issue in the proceedings below precludes review of such issues here. As such, this Court is without jurisdiction to hear this case.

VII. RELEVANT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS.

There are no relevant federal constitutional provisions, treaties, statutes, ordinances or regulations bearing upon this case.

VIII. COUNTERSTATEMENT OF THE CASE

In May of 1977, petitioner, Joseph Alberici, entered into a contract to purchase a movie theatre located in Aston, Pennsylvania, known as the Jerry Lewis Theatre. Settlement on the sale was scheduled for August of that year. Shortly before settlement, however, a fire broke out resulting in substantial damage to the theatre.

After the fire, Mr. Alberici proceeded to settlement on the purchase of the theatre. He also submitted claims to the various insurers covering the fire risk. In sworn proofs of loss submitted to the insurers, Mr. Alberici stated that the cause of the fire was "unknown to insureds." Though the purchase price for the theatre had only been $210,000.00, the total amount of insurance purchased by Mr. Alberici exceeded $450,000.00.

The insurers refused to voluntarily settle the fire loss claims, and Mr. Alberici, along with his wife, commenced the present action in the court of Common Pleas of Delaware County, Pennsylvania.

Law enforcement agencies investigating the fire quickly determined that it was incendiary in origin. Subsequent investigations culminated in an indictment being issued against Mr. Alberici by a grand jury in the United States District Court for the Eastern District of Pennsylvania. The indictment charged Mr. Alberici with engaging in a scheme to defraud his insurance companies by hiring arsonists to burn the movie theatre, so that he could recover the fire insurance proceeds from the policies covering the theatre.

The criminal case was tried to a jury before the Honorable Louis Pollack of the Eastern District of Pennsylvania, in 1981. The jury returned a verdict of guilty on all six counts of the indictment. During the post-trial motions, however, District Judge Pollack vacated the guilty verdicts for five of the six counts, due to a perceived variance between the language of the indictment, and the manner in which Judge Pollack charged the jury. The verdict on the remaining court of the indictment, Count V, was allowed to stand. Mr. Alberici was convicted on that count, and judgment of sentence was imposed.

Meanwhile, the insurers, Respondents here, pleaded defenses of fraud and arson in response to the suit brought by Mr. Alberici on the fire insurance policies. Once Mr. Alberici's conviction on Count V of the indictment had been established in the District Court, the insurers asserted a collateral estoppel defense. The insurers contended that Mr. Alberici's conviction for mail fraud conclusively established his fraudulent conduct. Under provisions of the insurance policies, required by Pennsylvania statute to be contained in all fire insurance policies, any fraud on the part of the insured will act to void the policies. Asserting this estoppel argument, the insurers moved for summary judgment, which was granted by the trial court.

Mr. Alberici appealed the grant of summary judgment to the Pennsylvania Superior Court. The Superior Court determined that because the mail fraud conviction had not yet been affirmed on appeal, disputed issues of fact remained, precluding summary judgment. The suit was, accordingly, remanded to the trial court.

Shortly, thereafter, Mr. Alberici appealed his conviction to the U.S. Court of Appeals for the Third Circuit, which affirmed the entry of judgment of sentence. *U.S. v. Alberici,* 735 F.2d 1351 (3d Cir. 1984). A subsequent Petition for Writ of Certiorari filed with this Court was denied. *Alberici v. U.S.*, 469 U.S. 1072 (1984). Mr. Alberici served the sentence imposed upon him of 22 months incarceration at the Allenwood Federal Correctional Facility.

On remand of the state court action, further discovery was conducted. Mr. Alberici was served a set of Requests for Admissions asking him to admit that his conviction had been affirmed by the Third Circuit, and that this Court denied certiorari. Alberici admitted these facts. Based upon this record, the insurers again moved for summary judgment, which was granted.

On appeal to the Pennsylvania Superior Court, the judgment entered against Joseph Alberici was affirmed, while the judgment against his wife, Theresa Alberici, was reversed. In its opinion, the Superior Court held that the conviction of mail fraud established, as a mater of collateral estoppel, Mr. Alberici's fraudulent conduct in connection with his insurance claims. Giving force to the anti-fraud provisions required to be contained in the insurance policies, the court determined that Mr. Alberici was barred from recovery under those policies which contained the anti-fraud clause.

One of the policies did not contain an anti-fraud provision. Nonetheless, the Pennsylvania Superior Court determined that Mr. Alberici was barred from recovery, under long established Pennsylvania case-law holding

that a criminal wrongdoer may not be allowed to profit from his wrongdoing, as a matter of public policy. *See*, Opinion of the Pennsylvania Superior Court reproduced in the Appendix as Exhibit "A".

Joseph Alberici filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania seeking review of the Superior Court's decision. The Pennsylvania Supreme Court, however, refused to grant Allowance of Appeal, by Order dated August 18, 1992. Mr. Alberici filed a motion for reconsideration with the Pennsylvania Supreme Court, which was denied, by order dated October 8, 1992.

The currently pending Petition for Writ of Certiorari was originally filed with this Court on or about December 31, 1992. The petition was initially rejected from filing by the Clerk, and was refiled on or about February 12, 1993.

Respondents note that petitioner does not confine his factual allegations to the Statement of the Case section of the Petition for Writ of Certiorari. In his *pro se*, 65 page filing, petitioner makes a multiplicity of allegations and charges, which are presented in a rambling and somewhat incoherent manner. Respondents will attempt, consistent with the requirements of Sup. Ct. R. 15, to address all material misstatements of fact or law set forth in the Petition for Writ of Certiorari. However, given the difficult style of exposition employed by the Petitioner, Respondents observe that a complete refutation of the welter of allegations and claims stated in the Petition is nearly impossible.

IX. SUMMARY OF ARGUMENT

This Court is without jurisdiction to grant the Writ of Certiorari requested by petitioner herein. Petitioner requests a Writ of Certiorari to be issued to the Supreme Court of the Commonwealth of Pennsylvania so that this Court may review the decision reached by the appellate courts of Pennsylvania affirming entry of summary judgment against Joseph Alberici. These decisions, awarding summary judgment against Joseph Alberici and affirming that award of summary judgment, were reached in reliance upon clear and uncontroverted principles of state law, having no implication, whatsoever, upon the federal constitution, statutes, treaties, or other sources of federal decision making. Instead, the decision to enter judgment against Joseph Alberici rested solely upon application of Pennsylvania common law principles. Since no substantial federal issue is implicated by the Pennsylvania state court determinations in this case, and since those determinations rest entirely upon an adequate and independent state law basis, this Court is without jurisdiction to issue the Writ of Certiorari which has been requested.

Moreover, even if it were to be determined that some manner of federal issue was implicated in this case, it is apparent that the entry of judgment against Joseph Alberici in this action was appropriate, and requires no further review by this Court. The crux of Mr. Alberici's argument to this Court is that his initial criminal conviction was, somehow, in error. He seeks, by means of this Petition, review of the propriety of that conviction.

Despite Mr. Alberici's desires in this regard, these issues have already been exhaustively litigated in the

United States District Court for the U.S. Court, during post-trial motions, and on appeal, to the U.S. Court of Appeals for the Third Circuit. Additionally, Mr. Alberici has petitioned this court for a Writ of Certiorari concerning his criminal conviction, which petition was denied on December 3, 1984. *U.S. v. Alberici*, 469 U.S. 1072 (1984). Mr. Alberici's claims have therefore been rejected at every step of the proceeding. The Pennsylvania state courts' decision to deny Mr. Alberici his claim for insurance proceeds, as a result of his conviction for fraud, represents nothing more than the implementation of the salutary judicial policy that, at some point, judgments must be deemed to be final, and litigation must be put to an end. In this case, Mr. Alberici's criminal conviction has been the subject of exhaustive review and re-examination, and the state court's application of that conviction for collateral estoppel purposes need not be disturbed here.

X. ARGUMENT

A. THIS COURT IS WITHOUT JURISDICTION TO ISSUE THE REQUESTED WRIT OF CERTIORARI.

1. The Decision Sought to be Reviewed Rests Upon Adequate and Independent State Grounds, Precluding Further Review by this Court.

A copy of the Superior Court's decision affirming the grant of summary judgment against Joseph Alberici has been reprinted in the Appendix. As a review of that decision will reveal, the Pennsylvania Superior Court's determination that summary judgment was properly entered against petitioner, Joseph Alberici, rests solely,

and exclusively, upon application of Pennsylvania common law and statutory precepts. Specifically, the Superior Court's decision involves a determination as to what effect, if any, is to be accorded to Mr. Alberici's criminal conviction on the charge of mail fraud. As a matter of Pennsylvania state law, the Pennsylvania Superior Court determined that the proper application of Mr. Alberici's conviction required that summary judgment be entered. As that decision involves no interpretation of federal statutory, regulatory, or constitutional precepts, and relies, instead, upon Pennsylvania authority, established principles of federalism require that this court refuse to review the Pennsylvania state courts' decisions in this matter.

This Court's power to review the final determinations by the several state courts of last resort has always been limited. In the Judiciary Act of September 24, 1789, Congress, in Section 25, first passed legislation authorizing this Court to review determinations by state appellate courts, and, at the same time, circumscribed the scope of that review.

Originally, jurisdiction over state courts was limited to cases in which the state court had held some federal act invalid, or had upheld the validity of a state act against a claim based upon the federal constitution or laws. The limited review granted to this Court over state court decisions is understandable, given the unique nature of our system of federalism. While ordinarily it is unusual for the court of one sovereign to have appellate jurisdiction over the courts of other sovereigns, given the nature of the federalist system itself, and the constitution's explicit grant of supremacy to the federal system,

the ability of this Court to exercise some form of appellate jurisdiction over the courts of last resort of the several states has only rarely been questioned.

At the same time, however, the limited nature of that appellate jurisdiction has *always* served as a necessary counterbalance to the federal court's superior position. As has been well stated by Justice Jackson:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds . . . The reason is so obvious that it has rarely been thought to warrant statement. It is founded in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. *Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.* Our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945). (emphasis added).

Currently, the limits of this Court's jurisdiction to review decisions by state courts are set forth in 28 U.S.C. § 1257 which provides, in its entirety, as follows:

> (a) Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn

> into question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or any authority exercised under, the United States.
>
> (b) For purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

28 U.S.C. § 1257.

Instantly, even a cursory review of the decision by the Pennsylvania Superior Court in this case indicates that no question has been raised regarding the validity of any treaty or statute of the United States, nor has any Pennsylvania statute been drawn in question on the ground that it is or was repugnant to the Constitution, treaties, or laws of the United States. Similarly, on its face, it is apparent that the Superior Court's decision does not address, in any manner whatsoever, any claim by the Albericis of a title, right, privilege, or immunity which is especially set up or claimed under the Constitution, treaties, statutes, or other authority of the United States.

Instead, the claim asserted by Mr. Alberici appears to be grounded solely upon the principles of Pennsylvania contract law. As a holder of insurance policies issued in Pennsylvania, Mr. Alberici has brought this case asserting that the insurers have failed to fulfill their contractual obligations by refusing to compensate him for a loss. Though Mr. Alberici now claims (for the first time) that

the Pennsylvania state courts' refusal to grant judgment in his favor amounts to a deprivation of due process, the mere denial of a contractual claim does not qualify as a denial of due process. *Tidal Oil Co. v. Flanagan,* 263 U.S. 444 (1924).As was the case in *Tidal Oil,* in this case there is no denial of due process for the reason that:

> The parties to this action have been fully heard in the state court in the regular course of judicial proceedings and in such a case the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law.

Id., 263 U.S. 444, 450.

As such, by its plain terms, § 1257 of the Judiciary Act appears to bar this Court's grant of the requested writ of certiorari.

Though there can be little question regarding the state common law and statutory basis for the Pennsylvania Superior Court's decision in this case, Respondents are aware of the cases, decided by this Court, holding that a state court's refusal to accord appropriate claim and issue preclusion status to a prior federal judgment raises a federal question reviewable here. *See, e.g, Stoll v. Gottlieb,* 305 U.S. 165 (1938); *Toucey v. New York Life Insurance Co.,* 314 U.S. 118 (1941); *Limbach v. Hooven & Allison Co.,* 466 U.S. 353 (1984). In those cases, however, this Court's discretion to grant certiorari has been exercised only where the state court proceedings have refused to give effect to the prior federal decision. *See, e.g., Stoll* ("As the contention is that the ruling below disregarded decrees of a Court of the United States it raised a federal question reviewable under Section 237(b) of the Judicial

Code, 28 U.S.C.A. § 344(b).") and *Limbach*, ("We perceive in this case no state-law overtones that, by any stretch of the imagination, could serve to insulate the case from review here. We are concerned with federal issues *and a contention that a state court disregarded a federal constitutional ruling of this Court*. The issue, then, is reviewable here.") (Emphasis supplied).

In the present case, however, there is no contention that the courts of the Commonwealth of Pennsylvania failed to give effect to a federal court's decision. To the contrary, this case involves the opposite of the situation in *Stoll* and *Limbach*, in that the Pennsylvania state courts have given appropriate deference and enforcement to the conviction entered by the District Court following Mr. Alberici's trial. As such, no federal question is presented for review by this court.

2. There is no Substantial Federal Issue to be Determined by this Court

Though Respondents contend that the decision here sought to be reviewed rests upon an adequate and independent state law basis, it is conceded that the application of a federal court judgment can, possibly, be seen as involving a federal question. Even so, it is clear that this case involves absolutely no *substantial* federal issue to be determined by this Court.

The failure to present a substantial federal question for review undercuts this Court's jurisdiction to review a state court judgment. Where it appears that an insubstantial issue has been raised, the writ of certiorari will be dismissed as improvidently granted. *Duncan v. Tennessee*,

405 U.S. 27 (1972). As was noted in *Equitable Life Assurance Society v. Brown*, 187 U.S. 308 (1902):

> There must be a real, substantive question on which the case may be made to turn, that is, a real and not a merely formal Federal question is essential to the jurisdiction of this court. Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for controversy, the motion to dismiss will prevail.

Id., 187 U.S. 308, 311 (1902).

Of course, this requirement of substantiality has been codified in this Court's Rules of Procedure. Sup Ct R. 10.1 advises that a writ of certiorari will only be granted where there are "special and important reasons therefore." An examination of the issues raised in this case, however, discloses that no "special and important" reasons exist to justify review.

This case involves a relatively routine application of a federal judgment for purposes of collateral estoppel. This is a common place, common law determination involving no unique, unusual or substantial issue. In fact, the standard for proper application for federal criminal judgments in subsequent civil actions was established by this Court in *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951). That standard was followed by the Pennsylvania Superior Court in this case, and has not

been disturbed by this Court in the forty years since the *Emich* decision was rendered.

Employing the *Emich* reasoning, the Pennsylvania Superior Court properly determined that Mr. Alberici's conviction for mail fraud necessarily included a finding that Alberici had engaged in a fraudulent course of conduct relating to the insurance policies which he presently sues upon. Since, under *Emich*, courts are free to apply criminal convictions where the issues are "distinctly put in issue and directly determined in the criminal prosecution," the Pennsylvania Superior Court correctly determined that the finding of fraud in the criminal court conviction could properly be applied in the Pennsylvania state court suit on the insurance policies. Turning, then, to Pennsylvania state law, the court determined that the anti-fraud clauses included in the insurance policies (as required by Pennsylvania statutory law) prohibited Mr. Alberici from making recovery under those insurance policies.

Since the standards for application of a federal criminal conviction are not in dispute, and have not been in dispute since the decision in *Emich*, and since the application of the federal criminal conviction in this case appears to have been correct, there is no substantial federal issue for this Court to review. Accordingly, certiorari should be denied.

3. Petitioners Failed to Raise Any Substantial Federal Issue in the Proceedings Below

A review of the complaint filed in this action indicates absolutely no claim of a federal right or interest

asserted by the plaintiffs. Instead, the complaint sets forth a relatively mundane contract claim under the principles of Pennsylvania common law. *See*, Plaintiff's Complaint in Assumpsit, a copy of which is reproduced (without attachments) in the Appendix as Exhibit "C".

When confronted with the claim of collateral estoppel based upon his criminal conviction, Mr. Alberici made no argument that the application of his criminal conviction in this case somehow violated federal constitutional, statutory or common law precepts. Instead, the sum and substance of Mr. Alberici's resistance to the application of collateral estoppel has been that his criminal conviction was, in the first place, improper. Never, during the state court proceedings, has Mr. Alberici raised a claim that the *manner* in which his conviction was being applied constituted a violation of any federally secured right. In sum, Mr. Alberici does not contend that the use of his conviction for collateral estoppel purposes has been carried out in a constitutionally defective manner. Instead, his argument appears to be that the conviction, itself, is invalid, despite the conviction's affirmance upon appeal. In fact, nowhere in the record of this case has Mr. Alberici asserted the denial of due process which he presently claims. Only now, when required, on petition to this Court, to justify jurisdiction, has Mr. Alberici raised such claims.

It is axiomatic, however, that on petition for a writ of certiorari to be issued to a state court, the federal claim must have been raised, and preserved initially, in the state court proceedings. *Tacon v. Arizona*, 410 U.S. 351 (1973). The failure to raise a significant federal issue at

the stages of proceedings required by state law will preclude further review in this Court. *Edelman v. California*, 344 U.S. 357 (1953). In Pennsylvania, issues not raised by an appellant on the initial appeal, and clearly set forth in the "questions presented" section of the appellant's brief, will not be addressed by the appellate court, and are deemed waived. Pa. R.A.P. 2116 (a); *Park v. Chronister*, ___ Pa. Commw. ___, 617 A.2d 863, 868 (1992). An issue, once waived in the state courts, will not be reviewed by this Court. *Beck v. Washington*, 369 U.S. 541 (1962).

In his appeal to the Pennsylvania Superior Court, Alberici raised no due process question regarding the application of his federal criminal conviction in the state court proceeding. Though he currently complains of a denial of due process rights, a review of the Statement of Questions presented by Mr. Alberici in his superior Court brief fails to raise, either directly or by implication, any federal constitutional issue whatsoever. *See*, Alberici Statement of Questions Presented in the Superior Court, a copy of which is attached hereto as Exhibit "D". Since no such issue was raised in the Superior Court, considerations of comity and federalism preclude this Court from granting further review. As such, the writ sought by Alberici in this case must be denied.

B. EVEN IF THIS COURT DETERMINES THAT A SUBSTANTIAL FEDERAL QUESTION HAS BEEN RAISED, WHICH WAS PROPERLY PRESERVED BELOW, CERTIORARI NEED NOT BE GRANTED, AS THE PENNSYLVANIA DECISIONS IN THIS CASE WERE PROPER

Petitioner contends that the Pennsylvania courts erred by holding that his conviction collaterally estopped

him from collecting fire insurance proceeds, for the reason that the conviction, itself, was somehow in error. Whether the conviction was erroneous or not, however, is a matter which is currently quite beside the point. The conviction has been affirmed on appeal. No habeas corpus proceeding has been pursued. For all intents and purposes, the conviction is an accomplished judicial fact. Now is not the time, and this court is not the place, for Petitioner to question the propriety of that conviction.

Yet, as a review of the currently pending petition makes clear, Petitioner's sole objective remains to protest his innocence of the charge upon which he already stands convicted. The "argument" portion of the Petition for Writ of Certiorari is divided into three main headings and 13 subheadings. Under the first main heading (arguing that the entry of summary judgment was error) six argument subheadings are included. All of these contentions relate to the propriety of the original conviction. Similarly, the second main argument heading refers, exclusively, to alleged abuses of governmental power in connection with Mr. Alberici's trial and conviction.

In fact, the complaints made by Mr. Alberici with regard to the conduct of the civil suit for insurance proceeds are quite limited. First, there is his belief that there is a conspiracy, involving the judges of the Delaware County Court of Common Pleas (as well as the former U.S. Attorney, the current Attorney General of Pennsylvania, and many others), to deprive him of his insurance proceeds. As has been noted by both the trial court in this action, and the Pennsylvania Superior Court, Mr. Alberici's complaints in this regard amount to little more than suspicion and innuendo; no specific allegation of bias,

collusion, or other judicial impropriety has been raised below, or here.

In fact, the *only* allegation of error made by Mr. Alberici regarding the Pennsylvania courts' application of the federal conviction for collateral estoppel purposes concerns his claim that the phrase "unknown to insureds" does not appear in the civil court record. Beyond the fact that this allegation does not raise a federal issue, it is apparent that this allegation is false.

Taken in a light which is most favorable to him, Mr. Alberici's complaint appears to be that the state courts improperly concluded, on the basis of his conviction, that Mr. Alberici misrepresented to his insurers that the cause of the fire was unknown to him. Alberici makes this argument because, according to him, the phrase "unknown to insureds" did not appear in Court V of the indictment, the only count upon which his conviction was allowed to stand. The fallacy in this argument is apparent.

The phrase "unknown to insureds" appears in Count I, paragraph 4 of Mr. Alberici's indictment. Though the verdict against Alberici on Count I was vacated by the District Court, the language contained in paragraph 4 of Count I, including the "unknown to insureds" wording to which Mr. Alberici so strenuously objects, was incorporated into Count V by the terms of the indictment. The conviction on Count V, therefore, necessarily included the allegation that Mr. Alberici falsely represented to the insurers that the cause of the fire was unknown to him.

As for the contention that the "unknown to insureds" language was never made a part of the civil court record,

the indictment was attached to the Request for Admissions served upon Mr. Alberici as part of discovery in the trial court. In fact, Mr. Alberici admitted that the copy served upon him was a true and correct copy, and also admitted that he was convicted on Count V of the indictment.

Since the only issues complained of by Mr. Alberici in his Petition relate to matters which have already been finally adjudicated, in his prior criminal conviction, or are patently frivolous, there is no reason for this Court to grant the requested writ of certiorari. The Petition should, therefore, be denied.

XI. CONCLUSION

This Petition fails to raise any issue appropriate for review in this Court. The decision sought to be reviewed rests upon an adequate and independent state law basis, and involves no substantial federal issue. Moreover, no issue of a federal nature was either raised or preserved below. Finally, the decision of the Pennsylvania state courts was properly reached in this case, requiring no further review.

The Petition for Writ of Certiorari should be denied.

DUANE, MORRIS & HECKSCHER

BY

MICHAEL O'HAYER
HUGH M. EMORY
Attorneys for Respondents

EXHIBIT A*

JOSEPH ALBERICI AND THERESA ALBERICI, Appellants v. SAFEGUARD MUTUAL INSURANCE COMPANY, GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., THE INSURANCE PLACEMENT FACILITY OF PA., QUAKER STATE MUTUAL GROUP AND HOME MUTUAL INSURANCE COMPANY OF PA., Appellees	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2928 Philadelphia 1990

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of DELAWARE County be, and the same is hereby AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. JURISDICTION IS RELINQUISHED.

BY THE COURT:

/s/ DAVID A. SZEWCZAK
PROTHONOTARY

Dated: OCTOBER 31, 1991

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* Any typographical and/or incorrect punctuation found in the following Appendix pages were left intentionally to show accurately how the original documents appeared.

JOSEPH ALBERICI AND THERESA ALBERICI, Appellants v. SAFEGUARD MUTUAL INSURANCE COMPANY, GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., THE INSURANCE PLACEMENT FACILITY OF PA., QUAKER STATE MUTUAL GROUP AND HOME MUTUAL INSURANCE COMPANY OF PA., Appellees	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2928 Philadelphia 1990

Appeal from the Order of the Court of Common Pleas of Delaware County, Civil division at No. 78-10515.

(Filed Oct. 31, 1991)

BEFORE: POPOVICH, HUDOCK & MONTGOMERY, JJ.

MEMORANDUM:

We are asked to review the grant of a motion for summary judgment entered against the plaintiffs/appellants, Joseph Alberici and Theresa Alberici, his wife. We affirm in part and reverse in part.

In assessing the grant of a motion for summary judgment, we apply the well-established standard of review:

> Motion for summary judgment may be granted only if "the pleadings, depositions, answers to interrogatories and admissions on

> file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa.R.Civ.P. 1035(b). In passing on a motion for summary judgment, this Court will view the record in the light most favorable to the non-moving party. *Kerns v. Methodist Hospital*, 393 Pa.Super. 533, 536-537, 574 A.2d 1068, 1069-1070 (1990); *Salerno v. Philadelphia Newspapers*, 377 Pa.Super. 83, 88, 546 A.2d 1168, 1170 (1988). In doing so, we accept as true all well-pleaded facts in the appellants' pleadings and give appellants the benefit of all reasonable inferences drawn therefrom. *Ector v. Motorists Ins. Companies*, 391 Pa.Super. 458, 4630464, 571 A.2d 457, 460 (1990). Summary judgment is appropriate only in those cases which are free from doubt. *Id.*

Dublin v. Shuster, ___ Pa.Super. ___, ___, ___ A.2d ___, ___ (J.-A19002/91, filed ___ ___, 1991) (Slip Opinion at 4-5).

This case has had a protracted history in the judicial system. In 1978, the plaintiffs filed a complaint in assumpsit against the defendants/insurance companies[1] for their failure to honor "loss claims" for damage caused by a fire to a building insured by the defendants for a total price of $224,244.00.

Separate answers were filed by Safeguard Mutual Insurance company and the remaining four insurers. In

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[1] The named defendants consist of Safeguard Mutual Insurance Company, General Accident Fire & Life Assurance Corp., Ltd., The Insurance Placement Facility of Pennsylvania, Quaker State Mutual Group and Home Insurance Company of Pennsylvania.

particular, Safeguard alleged in new matter that the fire was a result of arson and denied liability, while the other insurers asserted that a "concealment, fraud" clause in their policies voided the contracts because the plaintiff, Joseph Alberici, "acting on his own behalf as well as the behalf of the other plaintiff, did on March 31, 1978, under oath, willfully, deliberately and maliciously with intent to defraud . . . defendants, conceal[ed] the true origin of the aforesaid fire when, in fact, such origin was well known to him." See Paragraphs 56 & 54, respectively. Also, all insurers contended that the plaintiffs had no insurable interest in the insured property. Paragraphs 50 & 60, respectively.

On March 28, 1985, the defendants filed a motion for summary judgment claiming that the conviction of the plaintiff, Joseph Alberici, for mail fraud in federal court was an absolute bar to his recovery under the policies of insurance; Theresa Alberici was barred as well since she had no insurable interest in the property and her husband's procuring the incendiary fire insulated her from recovering under the policies of insurance.

In answer to the motion for summary judgment, the plaintiff Joseph Alberici asserted that his guilty verdicts on all six counts in federal court were overturned; he was granted a new trial on all counts save for number five (mail fraud); absent proof of arson, Joseph Alberici believed that the sending of the "loss" claim to the insurers was not mail fraud; and Mrs. Alberici did have an insurable interest because: (a) the property was purchased with assets jointly owned by the couple, (b) she was the "nominee" of her husband under the agreement of sale (causing a resulting trust to come into existence),

and (c) the absence of her name on the two Safeguard policies "was a pure oversight by the broker".

On March 25, 1986, the defendants filed a response to Theresa Alberici's partial motion for summary judgment. Therein the defendants denied that Joseph Alberici at any time designated his wife as his "nominee" under the agreement of sale to purchase the property in question. According to the defendants, Joseph Alberici's intent was to list a corporation as the "nominee". This was predicated upon the depositions of one Richard C. May and the plaintiff himself. See Exhibits A & B attached to Response of Defendants In Opposition To The Motion of Plaintiff, Theresa Alberici, For Partial Summary Judgment.

Further, the defendants denied having any knowledge of the source of the funds allegedly used to purchase the property or the intentions of the plaintiffs relative thereto. See Paragraphs 5-7. Also, the defendants asserted that Joseph Alberici's conviction for fraud extinguished his right to collect the proceeds of the defendants' insurance policies. See Paragraphs 13 & 15. Lastly, the defendants denied that there were no genuine issues of material fact in existence. In a memorandum of law submitted in conjunction with the defendants' objections, they "disputed" Theresa Alberici's claim that she was the "nominee" of Joseph Alberici. And they were of the belief that Joseph Alberici's wrongful conduct prevented his wife from benefitting therefrom. Thus, they requested that the motion be denied.

By order and opinion filed March 11, 1986, the defendant's motion for summary judgment was granted;

Theresa Alberici's request for partial summary judgment was denied. An appeal was perfected to this Court, and a panel reversed and remanded because:

> . . . [w]e d[id] not believe appellee[s] met [their] burden of establishing no genuine issue of material fact. Our review of the record le[d] us to conclude that this case involve[d] issues to be resolved in the trial court. * * * Accordingly, we reverse[d] the lower court's grant of summary judgment and remand[ed] th[e] case. . . .

Instead of the case proceeding to trial on remand, the plaintiffs submitted interrogatories to which the defendants objected. Likewise, the defendants filed a request for admissions to which the plaintiffs objected.[2] Nothing

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[2] The Request For Admissions Directed To Plaintiffs read in relevant part at page 5:

> 18. That Count V of the indictment reads "1. Paragraphs 1 through 4 of Count I are hereby incorporated by reference."
>
> 19. That by virtue of Count V's incorporation of paragraphs 1-4 of Count I, the allegations of fraud and scheming to defraud referred to in requests for admissions 2-14 were included in Count V, and were charges upon which Plaintiff Joseph Alberici was convicted.

In a follow-up Motion to Determine The Sufficiency Of Responses To Defendants' Request For Admissions, it was averred:

> 6. It is undisputed that Mr. Alberici was convicted of Count V of the indictment, which alleged the scheme that Mr. Alberici had entered into, as well as

was being resolved between the litigants. For example, a pre-trial report was filed by the defendants on May 20,

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> his fraudulent submission of claims, and that Mr. Alberici's conviction has become final by virtue of his exhaustion of all appellate procedures.
>
> 7. . . .
>
> 8. In order to establish the facts of Mr. Alberici's indictment and conviction for the purposes of the record in this case, Defendant caused to be served upon Plaintiff their Requests for Admissions. . . .
>
> 9. In response to these Requests for Admissions, Plaintiffs filed and served upon Defendants their Objections to Request for Admissions. . . .
>
> 10. . . .
>
> 11. The [Plaintiffs'] objections are clearly without any basis in law or fact. . . . Defendants are entitled to establish the facts of Mr. Alberici's conviction so that this Court may apply the principles of res judicata and collateral estoppel.

The plaintiffs' Response to Defendants' Motion To Determine The Sufficiency Of Responses To Defendants' Request For Admissions averred in pertinent part:

> 4. Denied. At no time has Joseph Alberici ever been charged with arson, a state crime; secondly, there was no conviction of mail fraud which was relevant to any claims relating to the Defendants in this action. . . .
>
> 5. . . .
>
> 6. Denied. It is in fact disputed that any indictment related to a scheme culminating in fraudulent

1988, wherein they alleged that Joseph Alberici could not recover under any of the policies of insurance because: (1) he participated in procuring the fire which destroyed the insured building; and (2) his conviction for mail fraud in connection with the submission of claims to the insurers. As for Theresa Alberici, she could not recover because she supposedly had no insurable interest, and, moreover, her husband's fraud worked to void the insurance coverage (under the "concealment/fraud" clause).

Notwithstanding the filing of the pre-trial statement, on the same date Theresa Alberici filed another motion for summary judgment in which she alleged, in relevant part, that the agreement of sale's reference to a "nominee" was meant to encompass her as an owner of the property; she provided funding and incurred an indebtedness to help purchase the property; and the omission of her name from two of the six policies of insurance was an "oversight" by the broker who sold the policies. See Paragraphs 2, 4-8 & 10. In an affidavit attached to the motion, Theresa Alberici swore that the plaintiffs had intended to own the property jointly, that on July 18, 1977, a corporation created to operate the property once it

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submission of claims or that any indictment or count thereof is relevant to this action.

* * *

13. Plaintiffs deny that there was any conviction on any count or indictment relevant to his action and plaintiffs ask that defendants produce evidence of a relevant conviction.

became a restaurant/catering hall met and officially designated her as the "nominee" of her husband as referred to in the agreement of sale, and the initial deposit ($5,000.00) and balance of the purchase price constituted a joint effort by the plaintiffs. See Paragraphs 2-6. These claims were repeated in the memorandum of law submitted simultaneously with the motion and affidavit.

Similarly, the plaintiff Joseph Alberici filed his own motion for summary judgment on October 7, 1988, in which he contended that the revenue to purchase the property was obtained in the name of the plaintiffs from lending institutions and his wife had an undivided interest in the property.

With regard to his federal indictments, the plaintiff alleged that he was acquitted of all counts relevant to the insurance companies. In fact, he urged, he was never charged with fraud. And, he was found not guilty of defrauding Safeguard and he was never charged with arson. Curiously enough, the two plaintiffs submitted additional motions for summary judgment on February 14 & 20, 1990, wherein it was asserted that Joseph Alberici was not convicted of mail fraud in federal court in relation to any of the defendants, and the "concealment of fraud" clause referred to "fraud in the inducement" in obtaining the policies and not to subsequent fraud. Therefore, fraud was not a proper defense.

On April 2, 1990, the defendants filed a Cross-Motion For Summary Judgment setting forth the averment that Joseph Alberici was indicted on August 31, 1982, for six counts of mail fraud; he was found guilty of all counts on January 19, 1983, with affirmance of the judgment of

sentence by the Third Circuit Court of Appeals; five of the six policies of insurance had an antifraud clause; Count V of the federal indictment incorporated paragraphs 1-4 of Count I, which contained general allegations that Mr. Alberici participated in a scheme to defraud the various insurance companies, and that he hired arsonists to destroy the property insured; and Theresa Alberici had no insurable interest in the property insured, it never being Joseph Alberici's intent that she would hold title to the property over a corporation established to take title.

Thereafter, on February 7, 1991, summary judgment was entered in favor of the defendants on grounds that: (1) Joseph Alberici's conviction for mail fraud by a federal jury precluded his recovery under any of the policies at issue; (2) Theresa Alberici was denied recovery because no credible evidence was presented to indicate that she had any legal or insurable interest in the property, nor could she be permitted recovery in light the antifraud provisions in the policies activated by Joseph Alberici's fraudulent submission of claims.

An appeal was perfected to this Court challenging the entry of the motion for summary judgment on various grounds.[3] The first question posed claims the commission of error on the part of the court below in "ignoring" this Court's previous panel decision and the ruling in *Harter v. Reliance Insurance Co.*, ___ Pa.Super. ___, 562 A.2d 330

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[3] By per curiam order dated August 29, 1991, the appellants' motion for reconsideration of the motion to strike the appellees' supplemental reproduced record and portions of the appellees' brief filed in this case was denied.

(1989), "in regard to the need of the Defendants to prove that Mr. ALBERICI'S previous conviction was a determination that he was guilty of arson, and the decision of *Maravich v. Aetna Life and Casualty Co.*, [___ Pa.Super. ___,] 504 A.2d 896 (1986) in regard to the issue of an innocent co-insured spouse's right to recover under the policies." Appellants' Brief at 11.

We disagree with the appellants' interpretation of *Harter*. We read the case to stand for more than the proposition espoused by the appellants that a conviction on an indictment for mail fraud must include an allegation of arson to bar any recovery under a fire insurance policy.

In *Harter*, the insurer/Reliance attempted to utilize the insured's federal conviction for mail fraud (which included an allegation of arson) to deny coverage under the long-established law in Pennsylvania that a criminal conviction on a charge of arson bars recovery by the defendant on any related fire insurance policy. See *Mineo v. Eureka Security Fire and Insurance Co.*, 182 Pa.Super. 75, 125 A.2d 612 (1956).

Upon review of the federal record[4] (indictment and charge to the jury), the *Harter* Court ruled that the insured was not charged with arson, nor was arson an element of the mail fraud crime for which the defendant was tried and convicted. Thus, the allegation of arson

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[4] The burden of production was on the insurer to provide the state trial court with the federal record of the insured's criminal trial. *Harter v. Reliance Insurance Co.*, ___ Pa.Super. ___, 562 A.2d 330, 335 (1989).

was not a necessary condition of the federal jury's verdict on mail fraud. This rendered erroneous the trial court's receipt of the insured's conviction for mail fraud as conclusive proof of the insured's guilt of arson, and preclusion of recovery under the policy of fire insurance.

In determining what was actually decided by the prior federal verdict, the *Harter* Court relied upon the doctrine of estoppel and looked to the formula set forth by the United States Supreme Court in *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 588, 71 S.Ct. 408, 414, 95 L.Ed. 534 (1951):

> . . . such estoppel extends only to questions *distinctly put in issue* and *directly determined* in the criminal prosecution. . . . In the case of a criminal conviction based upon a jury verdict, issues which were essential to the verdict must be regarded as having been determined by the judgment.
>
> * * *
>
> The difficult problem, of course, is to determine what matters were adjudicated in the antecedent suit. A general verdict of the jury or judgment of the court without special findings does not indicate which of the means charged in the indictment were found to have been used in effectuating the conspiracy. And since all of the acts charged need not be proved for conviction, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 [60 S.Ct. 811, 84 L.Ed. 1129] (1940), such a verdict does not establish that defendant used all of the means charged or any particular one. Under these circumstances what was decided by the criminal judgment must be determined by the trial judge hearing the treble-damage suit,

> upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict and any opinion of the courts. *Sealfon v. United States*, [332 U.S. 575, 578, 68 S.Ct. 237, 92 L.Ed. 180 (1948)]; *cf. State of Oklahoma v. State of Texas*, 256 U.S. 70 [41 S.Ct. 420, 64 L.2d. 831] (1921).

___ Pa.Super at ___, 562 A.2d at 335 (Emphasis in original).

As in *Harter*, our review of the federal indictment and opinions of the District Court (reproduced and attached to the various pleadings of record) indicates that the six counts of mail fraud were not all predicated upon the allegation that Joseph Alberici engaged in or procured arson as a condition precedent to the jury returning a verdict of guilty for mail fraud.[5]

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[5] The relevant portions of the federal indictment appear in Exhibit "A" of the April 2, 1990, motion for summary judgment filed by the defendants; to-wit:

INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES THAT:

1. At all times relevant to this Indictment, the Jerry Lewis Theatre (hereinafter "the theatre") was a structure located at 247 Concord Road, Aston, Pennsylvania.

2. On or about May 9, 1977, defendant

JOSEPH ALBERICI

entered into an agreement to purchase the theatre for $210,000.

For example, Paragraph 4(A)-(G) averred a scheme by Alberici to obtain money by false and fraudulent

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3. The purchase agreement referred to in paragraph 2, above, required defendant

JOSEPH ALBERICI

to make an initial 10% ($21,000) down payment, to enter into a 20 year mortgage in the amount of $100,000 at 9% interest, and to make a further down payment of $89,000 on the date of closing, August 10, 1977.

4. From in or about May 1977, through on or about September 5, 1980, defendant

JOSEPH ALBERICI

did devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses and representations, well knowing at the time that the pretenses and representations would be and were false and fraudulent when made, which scheme is set out more fully as follows:

(A). It was a part of this scheme that on or about May 14, 1977, defendant

JOSEPH ALBERICI

would and did purchase a $100,000 fire insurance policy on the theatre from the Safeguard Mutual Insurance Company. This policy was to expire on August 14, 1977.

(B). It was further a part of this scheme that on or about July 15, 1977, defendant

JOSEPH ALBERICI

would and did purchase a $100,000 fire insurance policy on the theatre through the Insurance Placement Facility of Pennsylvania. This policy was to expire on July 15, 1978.

pretenses, one facet of which was to purchase insurance in varying amounts from the defendants. Paragraph

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(C). It was further part of this scheme that on or about July 25, 1977, defendant

JOSEPH ALBERICI

would and did purchase a $125,000 fire insurance policy on the theatre from the General Accident Insurance Company. This policy was to expire on July 25, 1978.

(D). It was further part of this scheme that on or about July 26, 1977, defendant

JOSEPH ALBERICI

would and did purchase a $75,000 fire insurance policy on the theatre from the Quaker State Mutual Group Insurance Company. This policy was to expire on July 26, 1978.

(E). It was further part of this scheme that on or about July 26, 1977, defendant

JOSEPH ALBERICI

would and did purchase a $75,000 fire insurance policy on the theatre from the Eastern Mutual Company. This policy was to expire on July 26, 1978.

(F). It was further part of this scheme that on or about August 2, 1977, defendant

JOSEPH ALBERICI

would and did purchase a $25,000 contents insurance policy from Safeguard Mutual Insurance Company. This policy was to expire on July 26, 1980.

(G). It was further part of this scheme that all of the policies set out in subparagraphs (A) through (F), above, would be and were in fact in effect on August 6, 1977.

4(H)-(N) claimed Alberici solicited the aid of and compensated certain individuals to cause the arson of the

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(H). It as further part of this scheme that on July 28, 1977 defendant

JOSEPH ALBERICI

would and did place a telephone call to Joseph DiTizio for the purpose of asking Joseph DiTizio would and did contact Charles Allen for the purpose of enlisting his help in setting fire to the Jerry Lewis Theatre.

(I). It was further part of this scheme that on or about July 28, 1977, Joseph DiTizio would and did contact Charles Allen for the purpose of enlisting his help in setting fire to the Jerry Lewis Theatre.

(J). It was further part of this scheme that on or about July 28, 1977, Charles Allen would and did contact Vincent Fardella, a/k/a Vincent Mayo, for the purpose of enlisting his help in setting fire to the Jerry Lewis Theatre.

(K). It was further part of this scheme that on or about August 4, 1977, Charles Allen and Vincent Fardella would and did purchase naphtha for the purpose of using it to set fire to the theatre.

(L). It was further part of this scheme that on August 6, 1977, Charles Allen, Vincent Fardella, and Joseph DiTizio would and did travel to the Jerry Lewis Theatre and unload acid and naphtha into the theatre.

(M). It was further part of this scheme that on August 6, 1977, Charles Allen and Vincent Fardella would and did splash naphtha and acid throughout the interior of the Jerry Lewis Theatre and set it on fire.

property insured. Paragraph 4(P)-(Q) provided that Alberici caused proofs of loss, to obtain proceeds for the

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(N). It was further part of this scheme that defendant

JOSEPH ALBERICI

would and did pay a sum of money to Joseph DiTizio for his role in procuring the fire.

(O). It was further part of this scheme that on or about October 31, 1977, defendant

JOSEPH ALBERICI

would and did retain the services of the Young Adjustment Company to assist in the adjustment of his insurance claims arising from loss by fire of the theatre.

(P). It was further part of this scheme that defendant

JOSEPH ALBERICI

through the Young Adjustment Company, for the purpose of collecting insurance proceeds for the damage done by the theatre fire, would and did cause proofs of loss, executed by the defendant, to be forwarded to the Insurance Placement Facility of Pennsylvania, the General Accident Insurance Company, and Safeguard Mutual Insurance Company.

(Q). It was further part of this scheme that defendant

JOSEPH ALBERICI

would and did by the means described in paragraph (P), above, attempt to collect $214,244 for loss and damage to the theatre caused by fire.

damage done by the fire, to be forwarded to three of the defendants (i.e., Insurance Placement Facility of Pennsylvania, the General Accident Insurance Company, and Safeguard Mutual Insurance Company) in an attempt to collect $214,244.00 in damages. In Paragraph 4(R), the proofs of loss listed the fire as "unknown to insureds".

Except for Paragraph 4(H)-(N), none of the theories of fraud required any finding of arson on Alberici's part in order to find him guilty. Because there were alleged alternative theories of culpability which were mutually exclusive with regard to the allegation of arson, we conclude that the averment of arson was not essential to the jury's verdict. *Harter*, supra. As a result, Alberici's conviction of mail fraud could not have been received as conclusive proof of his guilt of arson.

However, although *Harter*, supra, did prohibit the reliance on a conviction of mail fraud as conclusive proof of the appellant's guilt of arson (where there were multiple theories of fraud aside from arson) to bar recovery by a defendant on any related insurance policy, the Court

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(R). It was further a part of this scheme that on the sworn statements in the proofs of loss described in paragraph (P), above, defendant

JOSEPH ALBERICI

would and did represent that the cause of the loss and damage occasioned by the August 6, 1977 fire "was unknown to insureds," which representations were false and fraudulent in that defendant

JOSEPH ALBERICI

had created a scheme to cause the fire and had performed acts in furtherance of that scheme.

did acknowledge that the inclusion of an anti-fraud clause in a policy of insurance would deny an insured recoupment of the proceeds of the policy in a civil suit if he/she engaged in any fraud or material misrepresentation touching any matter related to the insurance, *whether before of after the loss.* ___ Pa.Super at ___, 562 A.2d at 337, citing *Allegro v. Rural Valley Mutual Fire Insurance Co.*, 268 Pa. 333, 112 A. 140 (1920). We find the instant suit to be just such a case.

Once the jury returned a verdict of guilty on all six counts at Joseph Alberici's mail fraud trial, the United States District Court for the Eastern District of Pennsylvania granted Alberici's motion for a new trial on all but Count V of the federal indictment, one act of delivering materials connected with his fraudulent scheme to secure insurance proceeds from the defendants. Count V reads:

> THE GRAND JURY FURTHER CHARGES THAT:
>
> 1. Paragraphs 1 through 4 of count One are hereby incorporated by reference.
>
> 2. On or about January 23, 1978, the defendant
>
> JOSEPH ALBERICI
>
> in the Eastern District of Pennsylvania, having devised this scheme, for the purpose of executing this scheme to defraud and attempting to do so, did knowingly and willfully cause to be delivered by mail, according to the directions thereon, a letter containing schedules of value and loss, for a fire loss on August 6, 1977, at 247 Concord Road, Aston Township, Pennsylvania, which letter was addressed to Mr. Steven F.

Derrung[6] Curly Adjustment Company, 306 Walnut Street, Philadelphia, Pennsylvania 19106.

In violation of Title 18, United States Code, Section 1341.

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[6] To the extent Alberici assails the entry of the motion for summary judgment by allegations that no one by the name of Steven F. Derrung exists or worked for the company named in the indictment, this forum is an inappropriate place to contest the federal conviction, which Alberici is attempting to do from a fair reading of his pleadings, absent proof of fraud, perjury or some form of error now sufficient to invalidate the conviction. This appears unlikely since he has appealed his conviction and judgment of sentence to the Third Circuit Court of Appeals and the United States Supreme Court to no avail. Consequently, he will be prohibited from doing so in the court below under the cloak of a summary judgment challenge. As much was stated by our Supreme Court in *Hurtt v. Stirone*, 416 Pa. 493, 206 A.2d 624 (1965); to-wit:

> The defendant was presented with more than ample opportunity to overcome the charges lodged against him while he was swathed in a cloak of presumed innocence. His case was twice presented to a federal jury which found him guilty of extortion beyond a reasonable doubt, upon the same facts which are now urged as the basis for his civil liability. To now hold that the effect of those jury determinations is *nil* not only would be to fly i the face of reason, but also would be a general indictment of the whole American jury system. We are not now prepared to say that the mere technical effect not now prepared to say that the mere technical effect of the doctrines of res judicata and collateral estoppel regarding identity of parties is sufficient to overcome the policy which requires us to give conclusive effect to the prior conviction herein. The defendant should not now be heard to deny that which was established by his prior criminal conviction, without proof that his conviction was procured

See Exhibit "A" of the Defendnts' Cross Motion For Summary Judgment at page 10.

Of necessity, in order to make sense of the "scheme" attributed to Joseph Alberici, one needs to be cognizant of the facts mentioned in paragraphs 1 through 4 of Count I. Otherwise, the mere fact that Alberici was charged with having delivered by mail to a Mr. Steven F. Derrung schedules of loss tied to the fire would not in and of itself constitute a violation of the mail fraud statute.[7] Accordingly, paragraphs 1-4 of Count I, incorporated by reference into Count V, portrays Joseph Alberici

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> by fraud, perjury or some manner of error now sufficient to upset the conviction itself. Defendant has had his day in court and has failed to instill even a reasonable doubt in the collective mind of his then jury. No valid reason exists why he should be given a chance to try his luck with another jury.

416 Pa. at 498-499, 206 A.2d at ___.

[7] Federal statue requires specifically that a "scheme" be devised to defraud and the mails be utilized in furtherance of the artifice to constitute a contravention of the legislation; to-wit:

> § 1341. Frauds and swindles
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly

as one who devised a scheme to defraud the defendants/ insurers of money and took steps in the implementation thereof; namely: insurance coverage on a building and its contents was purchased from the defendants, Paragraphs 1-4(A)-(F); three named individuals were enlisted and paid by Alberici to set fire to the property, Paragraphs 4(H)-(N); a company (Curly or Curley Adjustment[8] was retained by Alberici to assist him in collecting insurance proceeds and to serve as a conduit through which proofs of loss would be funnelled to three of the five insurance companies, Paragraph 4(O)-(P); an attempt was made to collect $214,244.00 for loss and damage to the building consumed by a fire, Paragraph 4(q); and, lastly, the proofs of loss represented that the cause of the fire "was unknown to insureds", Paragraph 4(R).

> causes to be delivered by mail which it is directed to be delivered by the person to whom it is addressed, any such matter or things, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended August 12, 1970, Pub.L. 91-375, § 6(j)(12), 84 Stat. 778, 18 U.S.C. §1341 (Supp. 1989); see also 18 U.S.C. §1346 for definition of "scheme or artifice to defraud".

[8] Alberici urges in his pleadings and his appellate brief that there was no such company as "Curly" Adjustment. This spelling appears in the federal indictment. His attempt to undermine the grant of the motion for a summary judgment on this ground is the inappropriate forum to make such an allegation, absent fraud, perjury or some form of error now sufficient to invalidate the federal conviction. See note 6, supra. This burden has not been satisfied and its lack thereof dispenses with the need to respond to Alberici's contention with regard to the "Curly" nomenclature.

From our review of the record, we conclude that there were sufficient facts alleged in the federal indictment, in particular Paragraphs 1-4 of Count I and Count V, to sustain the jury's verdict of guilt for mail fraud for Alberici's scheme to use the mails to defraud the insurers by submitting fallacious claims misrepresenting the cause of a fire which damaged property insured by the defendants. Cf. *Com., Dept. of Transp. v. Mitchell*, ___ Pa. ___, 535 A.2d 581, 585 (1987) (it is well-settled that a conviction following a jury trial, like a plea of guilty, constitutes an admission of all facts averred in the indictment).

The District Court (per Pollock, J.), on this exact point, wrote in response to Alberici's request for post-trial relief that:

> I conclude that the jury, without question, would have found defendant [Joseph Alberici] guilty under count 5 had it been properly charged that it must be satisfied beyond a reasonable doubt that government exhibit 12 was delivered. The error that occurred [in charging the jury under the mail fraud statute in terms of "mailing" rather than "delivery", as appeared in the language of the grand jury's indictment], therefore, was harmless.
>
> Although I have found that the evidence adducted by the Government would have yielded a verdict of guilty only under count 5, it bears repeating that in any judgment the evidence would have been sufficient to support a verdict of guilty under the other counts as well had the jury been properly instructed. Wherefore, defendant's motion for a judgment of acquittal for lack of sufficient evidence will be denied. The other grounds relied upon by

defendant in challenging his conviction are without merit, and, therefore, denied.

CONCLUSION

Accordingly, in the accompanying Order, (1) this court's Order of July 25, 1983 granting a new trial is vacated with respect to count five only, and as to that count the jury's verdict of guilty is reinstated; and (2) defendant's motion for a judgment of acquittal and his alternative motion for a new trial are denied.

See Exhibit "F" at A-24 of Plaintiff Theresa Alberici's Motion for Partial Summary Judgment.

Therefore, consistent with our Supreme Court's admonition that "once there is a finding of guilty by a jury or judge, collateral attack upon such a finding will not be allowed unless it is established that the conviction was procured by fraud, perjury or some manner of error sufficient to upset the conviction," see *Folino v. Young*, ___ Pa. ___, 568 A.2d 171, 173 (1990), we decline Alberici's invitation (as evidence in his pleadings and appellate brief) to avail him the occasion to relitigate his conviction for mail fraud in a civil forum. Id. at ___, 568 A.2d at 174, wherein the Supreme Court agreed with Superior Court's decision to reverse and remand a judgment entered in appellant's favor to allow the trial court to enter a directed verdict against the appellant for his negligence in causing a death in a vehicular accident. The negligence was provable by the admission of the appellant's criminal conviction for driving at an unsafe speed.

As for the appellant's protestation in *Folino*, supra, that the introduction of his criminal conviction precluded

him from presenting evidence of justification or excuse for his violation of the statute, the Supreme Court disagreed and ruled that the trial court erred as a matter of law in submitting the question of the appellant's negligence to the jury. The appellant's criminal conviction established that he was negligent per se for civil-suit purposes. Id.; see also *Hurtt v. Strong*, 416 Pa. 493, 206 A.2d 624 (1965), cert. denied, 381 U.S. 925, 85 S.Ct. 1561, 14 L.Ed.2d 684 (1965) (felony and misdemeanor convictions can be introduced as conclusive evidence at a subsequent civil proceeding); *Burger King v. W.C.A.B.*, ___ Pa.Cmwlth. ___, 579 A.2d 1013, 1015-1016 (1990) (when a summary offense conviction is a necessary element of a felony or misdemeanor conviction, it can be introduced at administrative hearings as conclusive evidence).

As for Alberici's argument that the identification of just three of the five insurers in the federal indictment (see Count I, Paragraph 4(P)) as the objects of the scheme to defraud (having mail delivered) inhibited the remaining (unnamed) insurers from invoking the doctrine of collateral estoppel in their motion for summary judgment to bar him from collecting under any policies of insurance, we find the same to be meritless.

> Collateral estoppel applies only to issues already resolved by a previous action. "[F]or the doctrine of collateral estoppel to apply it must appear that the fact or facts at issue in both instances were identical; that these facts were essential to the first judgment and were actually litigated in the first cause." *"There is no requirement that there be an identity of parties in the two actions in order to invoke the bar." Collateral estoppel may be used as either a sword or a shield by a*

> *stranger to the prior action if the party against whom the doctrine is being asserted was either a party or in privity with the party in the prior action.*

Harter, supra, ___ Pa.Super. at ___, 562 A.2d at 355 (Citations omitted; emphasis added).

Even assuming, *arguendo*, that Quaker State Mutual Group and Home Mutual Insurance Company of Pennsylvania were not named parties to the federal suit, the fact that Joseph Alberici was convicted of mail fraud in his scheme to defraud insurers as to property carrying multiple coverage, two of which were issued by Quaker State and Home Mutual, would not prohibit the two from raising the doctrine of collateral estoppel in their motion for summary judgment to insulate them from liability to Joseph Alberici. Id. Such a defense arises from the inclusion of an anti-fraud clause in five of the six policies issued to Joseph Alberici; each reads:

> Concealment, fraud. This entire policy shall be void if, *whether before or after a loss*, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

See Complaint in Assumpsit, Exhibits "A", "C", "D", "E" & "F" (Emphasis added). Thus, contrary to Joseph Alberici's contention that the anti-fraud clause encompasses only *fraud in the inducement*, the invocation of the anti-fraud clause as written (with the verbiage "whether before or after a loss") is appropriate to embrace his

conviction for mail fraud. Contrast *Harter*, supra. Accordingly, we do not find fault with the grant of the defendants' motion for summary judgment on five of the six policies issued to the plaintiff Joseph Alberici under the anti-fraud clause argument. However, the same rationale cannot be relied upon with regard to the sixth policy (Safeguard Mutual Insurance Co. at No. F62-13513) covering the contents of the building burned for $25,000.00; contains no anti-fraud clause language as required by statute (40 P.S. § 636). Even the defendants concede as much:

> Five of the six policies here in issue contain the statutorily prescribed [anti-fraud] language, and it can safely be assumed that the sixth does also.
>
> * * *
>
> Five of the six policies clearly contain language providing that the entire policy will be rendered void by fraud and false swearing which occurs before or after the loss. * * * [S]ince it [i]s . . . recognized that the language employed in five of the six policies here at issue is effective to void those policies, there is little doubt that summary judgment must be granted in favor of defendants, at least on the five policies clearly containing the anti-fraud provisions.[3]

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[3] It can safely be assumed that if the entire policy was available, it also would have the required statutory language, thereby indicating that summary judgment was properly entered on that policy, as well.

Appellants' Brief at 17, 19-20 & n. 3. With the absence of the portion of Safeguard's policy indicating that it did

contain the anti-fraud clause, we may not "assume" that the language prevented Alberici from recovering. To do so would be pure speculation. Nonetheless, we may still deny Joseph Alberici any proceeds from the Safeguard policy No. F62-13513 for to do so "gives full effect to 'the common law principle that a person will not be permitted to profit by his own wrong, particularly his own crime.' " *Giacobetti v. Insurance Placement Facility of Pa.*, ___ Pa. ___, 457 A.2d 853, 857 (1983). Accord *Maravich v. Aetna Life and Casualty Co.*, ___ Pa.Super. ___, 504 A.2d 896, 907-908 (1986).

The second and third issues claim that the failure of the insurers to produce the federal record of Joseph Alberici's conviction was violative of *Harter*, supra, and impaired the court's ability to examine documents which would have shown that Alberici was not convicted of arson and that there was no evidence of mail fraud. We disagree.

We find the record to be more than adequate for us to assess the substance of what transpired in federal court. Secondly, the conclusiveness of the federal conviction, absent its procurement by fraud, perjury or some manner of error warranting its reversal, forecloses us from inquiring into the sufficiency of the evidence. See generally *Hurtt*, supra; *Harter*, supra.

The fourth and fifth issues proffered assert that Theresa Alberici was an innocent co-insured, with an insurable interest in the property, entitling her to benefit from the policies covering the damaged property.

> As a general rule, whether an innocent co-insured will be allowed to recover on a fire

> insurance policy after another co-insured has intentionally burned the insured property depends on whether the interests of the co-insureds are joint or severable. A majority of courts . . . have made this determination, i.e., whether the interests of co-insureds are joint or severable, by examining the terms of the contract of insurance to determine the nature of the coverage provided.

Maravich, supra, ___ Pa.Super. at ___, 504 A.2d at 902 (Citations omitted).

More particularly, the *Maravich* Court decided that the exclusion clause[9] in the insurer's policy, issued to the husband and wife (Maravichs), did not void coverage to the wife for the husband's intentional burning of their house. Because the policy did not define the Maravichs' interest, other than listing their names as the insureds, the ambiguity in the language of the insurance contract, i.e., whether it was joint or severable, was resolved in favor of the insured so that the rights of the innocent spouse were considered separate from those of the spouse who intentionally burned jointly owned property.

> [With respect to a fire insurance policy covering the interests of more than one insured] 'there is

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[9] The relevant exclusion clause in the insurer's policy issued to the Maravichs provided as follows:

> We do not cover loss resulting directly or indirectly from:
>
> . . .
>
> 5. *Neglect*, meaning neglect of the *insured* to use all reasonable means to save and preserve property at and after the time of a loss, or when property is endangered by a Peril Insured Against.

> much to commend the view that unless the terms . . . [thereof] are plainly to the contrary . . . the obligation of the carrier should be considered several as to each person insured, and the fraud or misconduct of one insured should not bar recovery by the innocent coinsureds to the extent of their respective interests in the property involved.
>
> * * *
>
> [*Maravich* Court] adopt[ed] this reasoning[and found:] The insured in Aetna's policy was defined as husband and wife. The policy did not define whether the interests of husband and wife in the policy were joint and indivisible or separate. The exclusionary language did not unequivocally exclude coverage for an innocent spouse in the event the property was burned by one of them. We construe this ambiguity in favor of the insured. It was reasonable, under such a policy, that an innocent spouse would expect to be indemnified against a loss which, as to her was fortuitous, and which was not excluded and, therefore, covered by the terms of the policy.

Id. at ___, 504 A.2d at 906 (Citation omitted).

Instantly, four of the policies listed Theresa Alberici as a co-insured with her husband: Safeguard Mutual Insurance Co. policy No. F62-13513, General Accident Fire and Life Assurance Corporation, Ltd. policy No. 5-760-89, Quaker State Mutual Group policy No. F-3405, and Home Mutual Insurance Co. of Pa. policy No. 51864. Additionally, we have averments appearing in the pleadings of the plaintiffs/appellants that Theresa Alberici incurred debt and expended personal and joint funds

with her husband toward the purchase of the building ultimately insured. Further, Joseph Alberici repeatedly has held to the position that the use of the phrase "or his nominee" in the agreement of sale purchasing the property in question referred to his wife, Theresa. This was later confirmed at a corporate meeting formally identifying Theresa Alberici as the "nominee" to the agreement of sale.

We find that the issues with regard to Theresa Alberici's having an insurance interest in the property, at least as to those insurance policies in which here name does not appear, is factually at issue and, thus, should not have been made the object of a motion for summary judgment.[10]

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[10] Although it is true that a person may not recover on an insurance policy in the event of loss if he or she has no insurable interest in the property, Theresa Alberici's expenditure of money to purchase the property in question constitutes her holding "such [a] relation to the property that its destruction by the peril insured against involves pecuniary loss to [her]. . . . " *Commonwealth v. Rodenbaugh*, ___ Pa.Cmwlth. ___, 519 A.2d 555, 563 (1986). Since the question of the intent of her husband in identifying her as the "nominee" in the agreement of sale and her supposed expenditure of money to help buy the property are contested by the defendants, the matter was not ripe for a motion for summary judgment. On remand, a trial will be necessary to decide these matters. The defendants conceded as much in their May 20, 1988, Pre-Trial Report; it provides:

> Ownership of an insurance policy is a factual question which is determined by the totality of the circumstances. *McDivitt v. Pymatuming Mutual Fire Insurance Co.*, 302 Pa.Super. 130, 136, 449 A.2d 612, 615 (1982). The court must examine whose name the policy is in, who paid the premiums and from what funds, and whether the policy was held for the common benefit

With regard to the argument that allowing the wife/co-insured to recoup under the policies for her husband's intentional act of burning the structure would be violative of public policy preventing a person from benefitting from his own criminal act, an argument raised by the defendants here, the *Maravich* Court concluded the better view to be in favor of paying an innocent spouse absent evidence that she assisted in or approved the husband's wrongful conduct; to-wit:

> The evidence in th[e] case was that David Maravich had intentionally set the fire which damaged the home and contents owned by husband and wife as tenants by the entireties. There was no evidence that Donna Maravich had had prior knowledge of her husband's intention to burn their home or that she had assisted in any way in causing the fire. As to her, the fire was fortuitous. By allowing Aetna to retain one-half of the loss, we give effect to the common law principle that David Maravich should not be permitted to profit from his own wrong. There is no public policy consideration, however,

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of husband and wife. Id. at 135-137 (449 A.2d at 615-16).

. . . *As the testimony at trial will indicate,* Mrs. Alberici is not named on these policies, she did not pay any of the premiums which were required by the policies, and any premiums which were paid did not come out of marital assets.

Id. at page 17 (Emphasis added). In addition to the preceding requiring a trial forum to resolve the questions posed by the defendants, the presentment of evidence regarding the issue of the existence of an "insurable interest" by Theresa Alberici needs to be heard by a trier-of-fact.

> which prevents the innocent person from recovering the indemnity which Aetna had agreed to pay for the loss which she sustained. A mere family relationship with the arsonist is inadequate to defeat the recovery of such indemnity.

Id. at ___, 504 A.2d at 907-908. This result is in accord with *Giacobetti*, supra, wherein the Supreme Court permitted beneficiaries under a trust agreement to receive the proceeds of an insurance policy payable upon the destruction of property. This was so even though the trustee had intentionally set fire to the property *and the policy had a "concealment, Fraud" provision* identical to the one at bar.[11]

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[11] The provision reads: "This entire policy shall be void if, whether before or after a loss, *the insured* has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto."

Even if we were to hold that the Court in *Giacobetti*, supra, did not paint with such a broad brush so as to permit the innocent co-insured to recover in spite of another co-insured's criminal conduct with regard to the property insured, there is federal case law which holds that a policy exclusion voided the policy upon the commission of a wrongful act by "any insured", in contradistinction to the language "the insured" which is not as inclusive. See *Spezialetti v. Pacific Employers Insurance Co.*, 759 F.2d 1139 (3rd Cir. 1985). The latter phrase being the one present in the case at bar, and there being no indication in the contracts of insurance as to how the named insured (Joseph and Theresa Alberici) were to consider their interests (joint or severable), case law dictates that:

> ' . . . unless the terms . . . [of a fire insurance policy covering the interests of more than one insured] are plainly to the contrary . . . the obligation of the carrier should be considered several as to each person

In doing so, the Court articulated its position thusly:

> Although appellee[/insurer] has not pressed its contention, raised in new matter, that it is not liable to the Trust under the "Concealment, Fraud" and the "Perils Not Included" clauses of the standardized policy, we conclude that, in any event, neither clause permits appellee to deny insurance proceeds to the Trust. The conduct of Harry Kracoff[/co-trustee/insured, who set fire to the insured property,] was wholly unilateral and in no way may be deemed to be an act of the Trust itself[so as to deny the proceeds from the fire insurance policy to the other named beneficiaries, but not including Kracoff's "children or issue" who where also beneficiaries under the Trust because they were the natural objects of his bounty.]

Id. at ___ 457 A.2d at 857. To the extent that the parties to the suit are preoccupied with whether the existence of the phrase "the insured" or "any insured" in the anti-fraud clause of the policies of insurance is pivotal to the determination of the case, *Giacobetti* would appear to resolve the question in favor of permitting an innocent co-insured recovery regardless of the phraseology in the anti-fraud clause.

For the reasons above-stated, we find all of the appellants' claims to be meritless save for those relating to the rights of the appellant/Theresa Alberici to recover under

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> insured, and the fraud or misconduct of one insured should not bar recovery by the innocent coinsureds to the extent of their respective interests in the property.'

Maravich, supra, ___ Pa.Super. at ___, 504 A.2d at 906 (citations omitted).

the policies, which she averred in the pleadings to being an innocent-co-insured in a building for which she incurred debt and expended joint funds with her husband to purchase.[12]

Accordingly, we reverse that portion of the order of March 14, 1990, granting summary judgment against appellant/Theresa Alberici; the portion of the same order entering judgment against the appellant/Joseph Alberici is affirmed.

Order affirmed in part, reversed in part and the case is remanded for proceedings consistent with this memorandum opinion. Jurisdiction is relinquished.

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[12] The appellants' sixth issue charges that the entire Court of Common Pleas of Delaware County should be disqualified from hearing their case and a change of venue should be granted. Suffice it to say, we read the record relating to this claim and find it totally lacking in merit. In addition, we would note that Judge Koudelis, in his opinion dated September 7, 1990, at pages 3-14, justified his denial of the appellants' motion for disqualification and change of venue. We find the discussion therein a proper response to the motion.

EXHIBIT B

IN THE COURT OF COMMON PLEAS OF
DELAWARE COUNTY, PENNSYLVANIA

CIVIL ACTION – LAW

JOSEPH ALBERICI and THERESA ALBERICI, his wife	:	No. 78-10515
v.	:	
SAFEGUARD MUTUAL INSURANCE COMPANY, GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., THE INSURANCE PLACEMENT FACILITY OF PA., QUAKER STATE MUTUAL GROUP AND HOME MUTUAL INSURANCE COMPANY OF PA.	:	

Edward Harkin, Esquire, Attorney for the Plaintiffs Hugh M. Emory, Esquire, Attorney for the Defendants

OPINION

LABRUM, J. FILED: 2-7-91

This matter arose out of claims brought by the Plaintiffs, Joseph and Theresa Alberici under six separate policies of insurance issued by the Defendant insurers. The claims resulted from an incendiary fire which occurred on August 6, 1977 at premises located at 247 Concord Road, Aston, Delaware County, Pennsylvania, known as the Jerry Lewis Theatre. In the most recent action before this Court Defendants filed a Motion for Summary Judgment and on October 4, 1990 this Court entered an Order

granting Judgment in favor of the various Defendants and against the Plaintiffs. Plaintiffs have appealed to the Superior Court.

After the fire of August 6, 1977, Joseph Alberici submitted claims for damage to the building located at 247 Concord Road to the various Defendants, representing under oath and in sworn statements of proof of loss, that the cause and origin of the fire in question was unknown and that he was not involved in procuring the incendiary fire.

Mr. Alberici was subsequently indicted for fraud in using the United States mail to claim insurance benifits for the fire from the Defendants. Mr. Alberici was convicted of one (1) count of the indictment by a jury in the United States District Court for the Eastern District of Pennsylvania. The conviction was affirmed by the United States Court of Appeals for the Third Circuit.

Of the six subject policies sued upon by the Plaintiffs, four insured against damage to the Theatre Building and two insured against damage to the building's contents. Five of the policies contained a provision which stated, as follows:

> This entire policy shall be void if, whether before or after the loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

The Pennsylvania Legislature requires this provision to be included in all fire insurance policies issued within

the Commonwealth. *40 P.S. 636.* At the time of the loss, Joseph Alberici was the named insured on all of the policies sued upon by the Plaintiffs. Theresa Alberici was a named insured on three of the six policies issued to the Plaintiffs.

In the Federal indictment, Joseph Alberici was accused of hiring arsonists to burn the Theatre Building, providing the arsonists with an opportunity to enter the premises and attempting to collect the fire insurance proceeds after the fire. Mr. Alberici allegedly employed the United States Mails in his attempt to collect the insurance proceeds. As previously stated, a conviction followed the indictment.

At the time of the fire, the Plaintiffs' interests in the property was based on an Agreement of Sale between Joseph Alberici and prior owners. The buyer indicated on the Agreement was Joseph Alberici or "his nominee." The name of Theresa Alberici did not appear in the Agreement of Sale. Additionally, Joseph Alberici testified that he intended that the subject property would ultimately be titled in the name of a corporation formed after the Agreement of Sale was executed.

Defendants filed a Motion for Summary Judgment alleging Joseph Alberici's involvement in the arson, which resulted in a granting of Summary Judgment in favor of all Defendants and against Plaintiffs. That Order was appealed to the Pennsylvania Superior Court, and the Superior Court reversed the trial Court. Although the Superior Court reversed as to all Plaintiffs and all Defendants, the Court's Opinion questioned and was directed to the status of Mrs. Alberici's claim. However, because

the appellate court reversed the Summary Judgment as to all Plaintiffs, the Plaintiffs have argued in the present matter that Mr. Alberici's claim was still undetermined.

After a review of the Motions for Summary Judgment, testimony presented in the matter and briefs and arguments of counsel, the Court entered an Order of October 4, 1990 granting Summary Judgment in favor of all Defendants. A copy of the said Orders is attached as an addendum to the Opinion. As stated in the Order, the Court determined that Mr. Alberici's fraud and role in procuring the arson had been conclusively determined by his conviction of mail fraud and therefore that the policies in question were void. Joseph Alberici's conviction for mail fraud precluded his recovery under any of the policies at issue in this case. The Federal jury determined that Mr. Alberici had participated in procuring the fire which caused the loss. Accordingly, he must be precluded under the theory that one who commits or procures arson may not recover from insurance on the property that has been burned. Additionally, the evidence established his fraudulent submissions of claims under the fire insurance policies. Under each of the policies, any showing of fraud would be sufficient to void the policies.

The law is clear that a criminal conviction of an insured for arson or fraud in connection with a fire loss claim constitutes an absolute bar to the right of the insured to recover damages under a policy of insurance in a civil action. *Harter v. Reliance Ins. Co.*, 386 Pa.Super 14, 562 A.2d 330 (1989). Additionally, the General Assembly enacted a Standard Fire Insurance Policy, 40 P.S. 636 Supra, which provided that the policy will be voided in the case of any fraud or false swearing by the insured

relating to the policy of fire insurance. This language, which was specifically stated in five of the six policies at issue, stated that the policies would be voided by fraud or false swearing occurring either before or after the loss.

This Court further ruled that Mrs. Alberici was not named insured on any of the policies, did not have an insurable interest in the property and that equitable principles would not permit Mrs. Alberici to profit from the fraud and illegal conduct of her husband.

Fraudulent burning of an insured premises precluded recovery under an insurance policy by all insureds. *Bowers Company v. London Assurance Group Corporation,* 90 Pa.Super 121 (1926). This Court is aware that situations have been presented wherein the Courts have held that the wrongful conduct of co-fiduciaries did not preclude recovery by beneficiaries of a trust, *Giacobetti v. Insurance Placement Facility of Pennsylvania,* 500 Pa. 447, 457 A.2d 853 (1983), and that recovery under a fire insurance policy was allowed for a co-insured's spouse where it had been determined that the spouse's husband had fraudulently burned the insured premises. *Maravich v. Aetna Life and Casualty Company,* 350 Pa.Super 392, 504 A.2d 896 (1986).

The current state of the law has recently been stated by the United States Court of Appeals for the Third Circuit in the case of *Speziletti v. Pacific Employers Insurance Company,* 759 F.2d 1139 (3d Cir. 1985) in which the court stated:

> *Jiacobetti, Opat* and *Kelner* (citations omitted) demonstrate that an innocent co-insured is no longer automatically precluded from recovery

> as a matter of law. It is fair to state that Pennsylvania now requires that the intent and relationship of the parties be established. If the facts in some cases establish that the underlining reason for denying coverage does not exist, under those circumstances it would be inequitable to apply an absolute bar. Although not expressed, the major concern of the cases denying recovering is the fear of collusion and fraud. Particularly in the husband and wife cases, an equally guilty spouse might recover policy proceeds because of the difficulty in proving participation in or knowledge of the arson committed by the other spouse.
>
> (P.1141)

While an innocent co-insured spouse is not automatically precluded from recovery, such a spouse may be precluded, upon a showing of involvement in fraudulent burning of the premises or if it is shown that due to the material relationship, the party procuring the fraud will benefit by an award of insurance proceeds to the other spouse.

In the present case, the Plaintiffs remain married, continue to live together and have at all times remained united in this litigation. An award of insurance proceeds to Mrs. Alberici in this case would permit Mr. Alberici to enjoy indirectly, a benefit which the law prohibits him from enjoying directly. For these reasons the Court denied Mrs. Alberici's ability to recover the proceeds under the policies.

Theresa Alberici was precluded from recovery under the policies because she never held an insurable interest in the subject premises.

Mrs. Alberici was listed as an insured on the policies of insurance issued by General Accident Fire and Life Assurance Corp., LTK., Quaker State Mutual Group and the Home Mutual Insurance Company of Pennsylvania. She was not listed as an insured on the policies issued by Insurance Placement Facility of Pennsylvania or Safeguard Insurance Company.

As previously stated, Theresa Alberici had no insurable interest in the Jerry Lewis Theatre. Since contracts of property insurance are personal contracts of indemnity, there can be no recovery if no loss is suffered. To recover under such a contract, a claimant must show both an existing contract of insurance and an insurable interest in the property. *Commonwealth v. Rodebaugh,* 102 Pa. Commonwealth Ct., 592, 519 A.2d 555 (1986). Furthermore, an interest based on a contingency does not create an insurable in real property. *Mut. Ben. Ins. v. Goschenhoppen Mut. Ins.,* 392 Pa. Super 363, 572 A.2d 1275 (1990).

Accordingly, no credible evidence was presented to indicate that Theresa Alberici had any legal or equitable interest in the property which would permit her to recover insurance proceeds under the policy.

Additionally, as previously stated in the matter of Joseph Alberici, Theresa Alberici was barred from recovering under the policies containing the anti-fraud provisions by virtue of Joseph Alberici's fraudulent submission of claims. Under the statute and policy language, any fraud or false swearing in connection with the fire insurance policies would void those policies. As such, none of the parties could recover under a void policy.

For all of the stated reasons, Summary Judgment was entered in favor of the Defendants and against the Plaintiffs.

BY THE COURT:

/s/ Joseph T. Labrum, Jr.
JOSEPH T. LABRUM, JR.,
JUDGE

EXHIBIT C

ISENBERG, GOLDIN & BLUMBERG
BY: M. Stuart Goldin
Identification No. 03937
Suite 623 – Four Penn Center Plaza
Philadelphia, PA. 19103
(215) 667-7760

I HEREBY CERTIFY THAT THE WITHIN IS A TRUE AND CORRECT COPY OF THE ORIGINAL FILED IN THIS MATTER.

/s/ M. Stuart Goldin

Attorney for Plaintiffs

JOSEPH ALBERICI and THERESA ALBERICI, his wife
1101 Angora Ave., Yeadon, PA

vs.

SAFEGUARD MUTUAL INSURANCE COMPANY
1321 Arch St., Phila., PA

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPORATION, LTD.
414 Walnut St., Phila., PA

THE INSURANCE PLACEMENT FACILITY OF PA
325 Chestnut St., Phila., PA

QUAKER STATE MUTUAL GROUP
14 East Main St., Allentown, PA

and

HOME MUTUAL INSURANCE COMPANY OF PA
407 Chestnut St., Emmaus, PA

DELAWARE COUNTY, PA
COURT OF COMMON PLEAS
TRIAL *DIVISION*
~~TERM~~

No. 78-10515

COMPLAINT IN ASSUMPSIT

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Name	Delaware County Bar Association
Address	Front & Lemon Sts.
City	Media, PA 19063 Tel. No. LO 6-6627

1. Plaintiffs, Joseph Alberici and Theresa Alberici are husband and wife an reside in Yeadon, Delaware County, Pennsylvania.

2. Defendant Safeguard Mutual Insurance Company is a corporation at all relevant times authorized to engage in the fire insurance business in the Commonwealth of Pennsylvania.

3. Defendant General Accident Fire and Life Assurance Corporation, Ltd. is a corporation at all relevant times authorized to engage in the fire insurance business in the Commonwealth of Pennsylvania.

4. Defendant The Insurance Placement Facility of Pennsylvania is a corporation at all relevant times authorized to engage in the fire insurance business in the Commonwealth of Pennsylvania.

5. Defendant Quaker State Mutual Group is a group of corporations which at all relevant times was authorized to engage as a group in the fire insurance business in the Commonwealth of Pennsylvania.

6. Defendant Home Mutual Insurance Company of PA is a corporation at all relevant times authorized to engage in the fire insurance business in the Commonwealth of Pennsylvania.

7. On or about May 9, 1977, plaintiff Joseph Alberici entered into an Agreement of Sale to purchase premises 247 Concord Road, Aston, Pennsylvania, as well as the improvements, equipment and contents therein.

8. On or about May 27, 1977, defendant Safeguard Mutual Insurance Company, in consideration of the premium set forth therein, executed and delivered its policy of fire insurance insuring plaintiff Joseph Alberici against loss by fire to the building described therein. A copy of said policy, being number F 62-13709, is attached hereto, is made a part hereof and is marked Exhibit "A".

9. On or about August 22, 1977, effective August 2, 1977, defendant Safeguard Mutual Insurance Company,

in consideration of the premium set forth therein, executed and delivered its policy of fire insurance insuring plaintiffs Joseph Alberici and Theresa Alberici against loss by fire to the contents of said building described therein. A copy of said policy, being number F 62-13513, is attached hereto, is made a part hereof, and is marked Exhibit "B".

10. On or about July 26, 1977, defendant General Accident Fire and Life Assurance Corporation, Ltd., in consideration of the premium set forth therein, executed and delivered its policy of fire insurance insuring plaintiffs Joseph Alberici and Theresa Alberici against loss by fire to the building described therein. A copy of the memorandum of insurance (the original policy having been returned to said defendant) is attached hereto, is made a part hereof, and is marked Exhibit "C". Plaintiffs demand that a copy of the said policy be attached to the said defendant's Answer.

11. On or about July 15, 1977, defendant The Insurance Placement Facility of Pennsylvania, in consideration of the premium set forth therein, executed and delivered its policy of fire insurance insuring plaintiff Joseph Alberici against loss by fire to the building described therein. A copy of said policy, being number PFP 145326-70 is attached hereto, is made a part hereof, and is marked Exhibit "D".

12. On or about August 1, 1977, effective July 26, 1977, defendant Quaker State Mutual Group, in consideration of the premium set forth therein, executed and delivered its policy of fire insurance insuring plaintiffs Joseph Alberici and Theresa Alberici against loss by fire

to building and contents described therein. A copy of said policy, being number F 3405 is attached hereto, is made a part hereof, and is marked Exhibit "E".

13. On or about July 27, 1977, defendant Home Mutual Insurance Company of Pennsylvania, in consideration of the premium set forth therein executed and delivered its policy of fire insurance insuring plaintiffs Joseph Alberici and Theresa Alberici against loss by fire to building and contents described therein. A copy of said policy, being number 51864 is attached hereto, is made a part hereof, and is marked Exhibit "F".

14. On or about August 6, 1977, the said building, improvements, equipment and contents continued to be under Agreement of Sale to plaintiff Joseph Alberici or his nominee.

15. On or about August 6, 1977, said building, improvements, equipment and contents were damaged by fire.

16. The said fire damage was as follows:

(a) Building $214,244.00

A copy of the building damage is attached hereto as Exhibit "G".

(b) Contents 10,000.00

A copy of the contents damage is attached hereto as Exhibit "H".

17. The apportionment of the loss is as follows:

Building Loss

Company	Policy Amount	Pays
Safeguard	$100,000.00	$ 47,609.79
General Accident	$125,000.00	$ 57,512.12
Insurance Placement	$100,000.00	$ 47,609.79
Quaker State	$ 62,500.00	$ 29,756.15
Home Mutual	$ 62,500.00	$ 29,756.15
Total:	$450,000.00	$214,244.00

Contents Loss

Company	Policy Amount	Pays
Safeguard	$25,000.00	$ 5,000.00
Quaker State	$12,500.00	$ 2,500.00
Home Mutual	$12,500.00	$ 2,500.00
Total:	$50,000.00	$10,000.00

19. Plaintiffs have complied with the co-insurance requirements of the policies issued by the defendants.

COUNT I

JOSEPH ALBERICI vs. SAFEGUARD MUTUAL INSURANCE COMPANY

20. Plaintiff Joseph Alberici incorporates by reference paragraphs 1 through 19 inclusive of this complaint as fully as though set forth at length herein.

21. On or about August 6, 1977, the Safeguard policy, Exhibit "A" was in full force and effect.

22. Plaintiff Joseph Alberici has done and performed all and everything necessary for him to do and

perform as conditions precedent to the bringing of this suit.

23. Plaintiff Joseph Alberici has demanded of defendant Safeguard Mutual Insurance Company the sum of $47,609.79 for said building loss but said defendant has refused to pay the same.

24. Defendant Safeguard Mutual Insurance Company has denied all liability for said loss.

WHEREFORE, plaintiff Joseph Alberici demands judgment against defendant Safeguard Mutual Insurance Company for said building loss in the sum of $47,609.79 with interest and costs.

COUNT II

JOSEPH ALBERICI and THERESA ALBERICI vs. SAFEGUARD MUTUAL INSURANCE COMPANY

25. Plaintiffs Joseph Alberici and Theresa Alberici incorporate by reference paragraphs 1 through 19 inclusive of this Complaint as fully as though set forth at length herein.

26. On or about August 6, 1977, the Safeguard policy, Exhibit "B" was in full force and effect.

27. Plaintiffs have done and performed all and everything necessary for them to do and perform as conditions precedent to the bringing of this suit.

28. Plaintiffs have demanded of defendant Safeguard Mutual Insurance Company the sum of $5,000.00 for said contents loss but said defendant has refused to pay the same.

29. Defendant Safeguard Mutual Insurance Company has denied all liability for said loss.

WHEREFORE, plaintiffs Joseph Alberici and Theresa Alberici demand judgment against defendant Safeguard Mutual Insurance Company for said contents loss in the sum of $5,000.00 with interest and cost.

COUNT III

JOSEPH ALBERICI and THERESA ALBERICI vs. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORP., LTD.

30. Plaintiffs Joseph Alberici and Theresa Alberici incorporate by reference paragraph 1 through 19 inclusive of this Complaint as fully as though set forth at length herein.

31. On or about August 6, 1977, the General Accident Fire and Life Assurance Corporation, Ltd. policy, Exhibit "C", was in full force and effect.

32. Plaintiffs have done and performed all and everything necessary for them to do and perform as conditions precedent to the bringing of this suit.

33. Plaintiffs have made demand of defendant General Accident Fire and Life Assurance Corporation, Ltd., in the sum of $57,512.12 for said building loss but the said defendant has refused to pay the same.

WHEREFORE, plaintiffs Joseph Alberici and Theresa Alberici demand judgment against defendant General Accident Fire and Life Assurance Corporation, Ltd. in the sum of $57,512.12 with interest and costs.

COUNT IV

JOSEPH ALBERICI vs. THE INSURANCE PLACEMENT FACILITY OF PA

34. Plaintiff Joseph Alberici incorporates by reference paragraphs 1 through 19 inclusive of this Complaint as fully as though set forth at length herein.

35. On or about August 6, 1977, the Insurance Placement Facility of Pennsylvania policy, Exhibit "D", was in full force and effect.

36. Plaintiff Joseph Alberici has done and performed all and everything necessary for him to do and perform as conditions precedent to the bringing of this suit.

37. Plaintiff Joseph Alberici has demanded of defendant The Insurance Placement Facility of Pennsylvania, the sum of $47,609.79 for said building loss but the said defendant has refused to pay the same.

WHEREFORE, Plaintiff Joseph Alberici demands judgment against defendant The Insurance Placement Facility of Pennsylvania in the sum of $47,609.79 with interest and costs.

COUNT V

JOSEPH ALBERICI and THERESA ALBERICI vs. QUAKER STATE MUTUAL GROUP

38. Plaintiffs Joseph Alberici and Theresa Alberici incorporate by reference paragraphs 1 through 19 inclusive of this Complaint as fully as though set forth at length herein.

39. On or about August 6, 1977, the Quaker State Mutual Group policy, Exhibit "E", was in full force and effect.

40. Plaintiffs have done and performed all and everything necessary for them to do and perform as conditions precedent to the bringing of this suit.

41. Plaintiffs have demanded of defendant Quaker State Mutual Group the sum of $32,256.15 consisting of $29,756.15 for building loss and $2,500.00 for contents loss, but said defendant has refused to pay the same.

42. Defendant Quaker State Mutual Group has denied all liability for said loss.

WHREFORE, plaintiffs Joseph Alberici and Theresa Alberici demand judgment against defendant Quaker State Mutual Group in the sum of $32,256.15.

COUNT VI

JOSEPH ALBERICI and THERESA ALBERICI vs. HOME MUTUAL INSURANCE CO. OF PA

43. Plaintiffs Joseph Alberici and Theresa Alberici incorporate by reference paragraphs 1 through 19 inclusive of this Complaint as fully as though set forth at length herein.

44. On or about August 6, 1977, the Home Mutual Insurance Company of PA policy, Exhibit "F", was in full force and effect.

45. Plaintiffs have done and performed all and everything necessary for them to do and perform as conditions precedent to the bringing of this suit.

46. Plaintiffs have demanded of defendant Home Mutual Insurance Company of PA in the sum of $32,256.15, consisting of $29,756.15 for building loss and $2,500.00 for contents loss, but said defendant has refused to pay the same.

47. Defendant Home Mutual Insurance Company of PA has denied all liability for said loss.

WHEREFORE, plaintiffs Joseph Alberici and Theresa Alberici demand judgment against defendant Home Mutual Insurance Company of PA in the sum of $32,256.15 with interest and costs.

COUNT VII

PLAINTIFFS JOSEPH ALBERICI and THERESA ALBERICI vs. SAFEGUARD MUTUAL INSURANCE COMPANY, GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., THE INSURANCE PLACEMENT FACILITY OF PENNSYLVANIA, QUAKER STATE MUTUAL GROUP and HOME MUTUAL INSURANCE COMPANY OF PA

48. Plaintiffs Joseph Alberici and Theresa Alberici incorporate by reference paragraphs 1 through 47 inclusive of this Complaint as fully as though set forth at length herein.

49. The conduct of all of the defendants toward plaintiffs in the handling of the claim arising out of the fire loss has been oppressive and malicious, was calculated to harm and did cause plaintiffs financial damage and mental anguish and was in breach of defendants' implied covenants of good faith and fair dealing.

WHEREFORE, plaintiffs demand judgment against each defendant for consequential and punitive damages in an amount in excess of $10,000 as well as counsel fees and costs.

ISENBERG, GOLDIN &
BLUMBERG
BY: _____
Attorneys for Plaintiffs

COMMONWEALTH OF PENNSYLVANIA :
: SS.
CITY AND COUNTY OF PHILADELPHIA :

JOSEPH ALBERICI, having been duly sworn according to law, deposes and says that he is one of the plaintiffs in the within action and that the facts set forth in the within Complaint in Assumpsit are true and correct to the best of his knowledge, information and belief.

/s/ Joseph Alberici
JOSEPH ALBERICI

Sworn to and subscribed before me

this 11th day of July, 1978.

/s/ Joan Morse
Notary Public
Joan Morse
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires April 12, 1980

EXHIBIT D

STATEMENT OF QUESTIONS INVOLVED

As the Appellee failed to provide a transcript of the Federal criminal trial to the Court below for its review?

Not answered by the Court below.

Has the Court below failed to review the transcript of the Federal criminal trial as required by *Harter v. Reliance Ins. Co.*?

Not answered by the Court below.

Was there a finding of arson or the procuring of arson by Joseph Alberici's conviction of one count of mail fraud?

Answered in the affirmative by the Court below.

Was the conviction of mail fraud relevant to this action against the insurance companies?

Answered in the affirmative by the Court below.

Does Theresa Alberici have an insurable interest in the premises destroyed by fire?

Answered in the negative by the Court below.

Does the conviction of Joseph Alberici preclude his innocent spouse from collecting insurance proceeds?

Answered in the affirmative by the Court below.

Has the Court below shown bias and prejudice against Plaintiffs to preclude them from a fair trial?

Not answered by the Court below.